Tranquility Holdings Limited v
Invista Real Estate Investment Management (CI) Limited
Royal Court
13th August, 2015

JUDGMENT
38/2015

Defendant's application under Rule 19 of The Royal Court Civil Rules, 2007 to strike out the Plaintiff's claim and for an order for costs.

Approved Text
13.08.2015

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:

TRANQUILITY HOLDINGS LIMITED **("the Plaintiff")**

-v-

INVISTA REAL ESTATE INVESTMENT MANAGEMENT (CI) LIMITED **("the Defendant)**

Judgment handed down: 13 August 2015

Before: Sir Richard Collas, Bailiff

Advocate for the Plaintiff/Respondent: **Advocate A C Williams**

Advocate for the Defendant/Applicant: **Advocate R G Shepherd**

Cases, legislation and references referred to:

The Royal Court Civil Rules, 2007
The Collective Investment Scheme Class B Rules 1990
Musa Holdings Ltd v Newmarket Holdings (Guernsey) Ltd [2014] GLR 41
EFG Private Bank (Channel Islands) Ltd v B. C. Capital Group S. A. (in liquidation) and 17 others [2014] GLR Note 11
Invescap Holdings Ltd v Douglass (unreported, 30 July 2014)
Civil Procedure Rules
Bolton Pharmaceutical Co 100 Ltd v Doncaster Pharmaceutical Group Ltd and Others [2006] All ER (D) 389 (May)
The Evidence in Civil Proceedings (Guernsey and Alderney) Rules 2011
Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch)
Swain v Hillman [2001] 2 All ER 91
ED & F Man Liquid Products v Patel [2003] EWCA Civ 472
Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550
Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63

ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725
The White Book
Britannia Building Society v Prangley June 12, 2000, unrep., Ch D
Harris v Bolt Burdon [2000] L.T.L., February 2, 2000, CA
Bridgeman v McAlpine-Brown January 19, 2000, unrep, CA
In Soo-Kim v Youg [2011] EWHC 1781 (QB)
Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co [2014] CP Rep 4:
Farah v British Airways, The Times, January 26, 2000,CA
Barrett v Enfield BC [1989] 3 W.L.R. 83, HL
Clerk & Lindsell on Torts, 20th edition
Snell's Equity (32nd edition)
Pantelli Associates Ltd v Corporate City Developments Number Two Ltd [2010] EWHC 3189
Collective Investment Schemes (Designated Persons) Rules 1988
Barclays Wealth Trustees (Jersey) Limited (in its capacity as trustee of the R2 Bulgaria Property Fund) v Equity Trust (Jersey) Limited [2014] JRC 102 D
Underhill and Hayton Law of Trusts and Trustees (18th Edition)
Kamfansin's the Legal Nature of the Unit Trust (Clarendon Press 1997 reprinted 2007) Thomas and Hudson's the Law of Trust (2nd Edition)
Galmerrow Securities Limited v National Westminster Bank (unreported, Chancery Division, 20 December 1993

Introduction

1. The Defendant in this action, Invista Real Estate Investment Management (CI) Limited ("the Defendant" and "the Manager") has applied under Rule 19 of The Royal Court Civil Rules, 2007 ("the 2007 Rules") to strike out the whole of the claim by the Plaintiff, Tranquility Holdings Limited, set out in its amended cause ("the Cause") or alternatively for summary judgment to be entered against the Plaintiff in respect of a number of specified paragraphs of the Cause or further that under Rule 52(2) of the 2007 Rules that the whole of the Cause be struck or alternatively that specified parts of the Cause be struck out. The Defendant also seeks an order for costs of the proceedings or, alternatively, of this application on a full indemnity basis. I refer to the application as "the Application".

2. The Plaintiff's substantive claim can be summarised briefly. The Plaintiff was the manager of the Invista Property Portfolio Fund ("IPPF" or "the Fund" or "the Trust"), an open-ended unit trust established in Guernsey and regulated by the Guernsey Financial Services Commission ("GFSC"). The Fund invested in the United Kingdom commercial property market as a fund-of-funds offering returns through both capital growth and income in the capital value and rental income of the underlying commercial properties. The Fund performed well until 2007 when the market for commercial property suffered a downturn. The Annual Report and Financial Statements for the year to 1 February 2008 show that the net assets attributable to unitholders as at 31 January 2007 were nearly £114 million but had fallen to a little over £80 million one year later. Initially applications for units exceeded redemption requests but the tide turned in 2007 such that the number of units across all classes fell from about 86 million to 70 million. The unit value of 'B' class units (the most numerous in issue) fell in the same period from 138.17 pence per unit for to 125.52 pence per unit. (In this judgment, as in the Trust Instrument, the net asset value of the Fund is referred to as the "NAV" and the value per Unit in each of the classes of issued Units is the "Unit Value".)

3. The level of redemption requests in late 2007 placed such a strain on the liquidity of the Fund that the Manager took a decision on 24 December 2007 to suspend dealings. Later the Fund was placed into liquidation. In the Cause, the Plaintiff, which had initially invested £2.35 million in the Fund, pleads that Mr Patrick Kenny, the beneficial owner and controlling party of the Plaintiff, formed an intention to redeem the investment to enable him to pay for the construction of a family home, the building contract for which he signed together with his wife on 30 April 2007. He states that the Defendant was aware of the intention to redeem. The Defendant denies having knowledge of the Plaintiff's intention to redeem and in an affidavit sworn by Mr Wayne Bulpitt, a director of the Manager, it is alleged that Mr Kenny

did not tell the Manager of his intention but told a director of the Fund's investment advisor. Whether the Defendant had such knowledge is of little or no relevance as the Plaintiff did not submit a written application for redemption until 18 January 2008, after dealings had been suspended, when it applied to redeem units to the value of 1 million euros *"once the suspension is lifted"* (volume 1 of the trial bundle at tab 2, page 356). In April 2007 the Plaintiff's Unitholding was valued at £2,961,796.60 but after all its allotted units were redeemed it ultimately received a total sum of £1,264,398.00 and claims to have lost a further £374,426.16 by reason of unfavourable currency exchange movements between the euro and sterling. The claim is for the difference between the value of the investment as at 30 April 2007 and the amount eventually received plus the currency loss, making a total claim of £2,071,824.76.

4. The Plaintiff seeks to recover its loss from the Manager as damages for breaches of fiduciary duty and duty of care owed to Unitholders, principally on the ground that the Manager offered preferential treatment to a number of larger investors in the provision of information to them and the preferential handling of their redemption requests in a manner that was prejudicial to Unitholders generally and thereby caused the liquidity problem that led to the allegedly avoidable decision to suspend dealings in the Fund. Alternatively, the Plaintiff seeks an order for equitable compensation, or an account, or restoration of the Fund, together with interest and costs. The Defendant denies the existence of the duties alleged as a matter of law, and/or denies that any duties that existed are enforceable by an investor alleging that they could be enforced only by the trustee of the Fund and/or denies that, as a matter of fact, there were any breaches of duty and/or contends that the Plaintiff's claim cannot succeed as a matter of causation.

The Constituent Documentation

5. IPPF was constituted by a trust instrument dated 5 November 2004 which was amended by deeds of variation dated 8 December 2004 and 1 November 2005, then further amended and restated as at 23 March 2006 by an instrument entered into between then trustee, RBSI Trustee Services (Guernsey) Limited, and the Defendant. The instrument was further amended and restated as at 13 April 2011 when the previous trustee had been replaced by BNP Paribas Trust Company (Guernsey) Limited ("the Trustee"). It is the 23 March 2006 version which was operative at the times material to this action and I will refer to it as the "Trust Instrument". The respective duties and responsibilities of the Defendant and the Trustee are set out in the Trust Instrument and are summarised, in part, in a document entitled "Scheme Particulars". In the Cause, the Plaintiff pleads duties set out in the Scheme Particulars rather than the Trust Instrument and I comment on the significance of that later in the judgment.

6. The Plaintiff agreed to be bound by the terms of the Trust Instrument when it submitted a subscription request dated 27 April 2005 (Volume 1, Tab 4 pages 7 to 11). Paragraph 5 thereof provides:

> *"By executing this Application Form, we agree to be bound by the terms of the Trust Instrument in respect of the Units stated above and any other Units which may be subscribed for by us or acquired for by us by Transfer from another Unitholder, or otherwise and this Application Form shall accordingly constitute our irrevocable agreement to abide by and be bound by the terms and conditions of the Trust Instrument as a Unitholder."*

7. Clause 15 of the Application Form was of similar effect *"we agree, acknowledge and are aware that by becoming a Unitholder, we will be bound by and subject to all the provisions of the Trust Instrument and our interest will be as a beneficiary of the Trust."*

8. Clause 17 declared that the agreement constituted by the Application Form was to be *"governed by and construed in accordance with, the Law of Guernsey"* and conferred non-exclusive jurisdiction on the Courts of Law in England and Wales and Guernsey.

9. The only parties to the Trust Instrument were the then trustee and the Manager. The recitals to the instrument explained that the Trustee acted as trustee of the Trust and the Manager managed the Trust. The trustee held the whole of the *"Trust Property upon Trusts for the Unitholders on the terms and with and subject to the powers and provisions of this Trust Instrument."* (Clause 2.2).

10. The objective of the Trust was defined as *"to provide Unitholders with capital growth and income by investing directly or via the LLP in Property Funds, which are primarily invested in United Kingdom commercial property assets (as such objective may be altered in accordance with the Rules)".* "The Rules" are The Collective Investment Scheme Class B Rules 1990, pursuant to which the Fund was regulated by the GFSC.

11. The terms and provisions of the Trust Instrument are declared to be binding on each Unitholder *"as if this Instrument contained:*

> *"2.6.1. covenants on the part of each Unitholder for itself and for all such persons to observe and be bound by its provisions".*

12. Reciprocal obligations of the Trustee and Manager to each other are to be found in Clause 2.8:

> *"2.8 The Trustee and the Manager respectively undertake, throughout the term of this Trust Instrument, in respect of their duties and obligations and any other services they provide to the Trust:*
> *2.8.1 to use their best efforts and judgement to act lawfully and in good faith towards the Trust and each other (including their agents or delegates); and*
> *2.8.2 to act with such reasonable skill and care as is to be expected of a competent and prudent trustee or manager (as appropriate), qualified and experienced in providing trustee or managerial services (as appropriate) to a unit trust of a comparable nature, size, scope and complexity of the Trust with a comparable objective to the Trust Objective."*

13. The Trustee issued Units to investors, "Unitholders" (clause 3). The Manager received notification of applications from prospective Unitholders and was responsible for carrying out regulatory checks on Unitholders (Clause 4). The Manager determined the issue price of any new Unit. The Manager had the power to suspend temporarily the calculation of net asset values and unit values in the circumstances set out in Clause 6. The Trustee had the power to borrow and raise money and issue loan notes and guarantees etc at the direction of the Manager (Clause 7). The Trustee appointed the Manager to keep the Trust's register with details of Unitholders (Clause 8).

14. Applications for redemption of Units by a Unitholder were the responsibility of the Manager as set out in Clause 11, the terms of which are considered in more detail elsewhere in this judgment. The Manager had the full power to manage the investments of the Trust Fund as if it were the absolute and beneficial owner of such investments *"but shall not be liable for any loss arising out of any investment made by it in good faith"* (Clause 14.2).

15. Some additional powers of the Trustee are set out in Clause 15; they are a mixture of obligations of different kinds. Some are obligations the Trustee had to discharge itself such as to take into its custody or under its control all the Trust property and hold it on trust in accordance with the provisions of the Trust Instrument and the Rules (Clause 15.1.2), or to become a member of the LLP incorporated between the Trustee and the Manager. Most of the duties involved the Manager, either requiring the Trustee to act on the instructions of the Manager or to discharge some supervisory responsibility over the Manager. Examples of the former are to carry out the Manager's instructions with regard to investments, preparing all cheques in respect of the Trust and making distributions to Unitholders at the direction of the Manager. Examples of the Trustee's supervisory responsibilities are that it shall:

> *"15.1.4 take reasonable care to ensure that the methods used by the Manager in calculating the Unit Value at which Units are issued and redeemed are in accordance with the Trust Instrument;* and
>
> *"15.1.13 take reasonable care to ensure that the Trust is properly managed by the Manager in accordance with the Rules".*

16. Clause 15.1.14 requires the Trustee to *"do all such other acts and things as the Trustee in its absolute discretion may decide are necessary or desirable in the interests of Unitholders and the Trust as a whole subject to and in accordance with the Rules."*

17. For its part, the Manager received applications from prospective investors and was responsible for calculating the issue value of Units which were issued by the Trustee to the Unitholder. The Manager calculated the NAV and the Unit Values as at each dealing day being the last business day of each calendar month. Redemption requests were received and processed by the Manager. The length of the notice periods required varied according to the value of the units to be redeemed and are considered in detail later in this judgment.

18. Additional powers of the Manager are set out in Clause 17 of the Trust Instrument. They included the preparation of the normal returns and annual accounts of the Trust, the appointment of auditors, the appointment of the investment advisor (Invista Real Estate Investment Management Limited, a sister company of the Manager), preparing and revising the Scheme Particulars and convening meetings of Unitholders. Generally it was required by Clause 17.1.24 to *"do all such other acts and things as the Manager may, in its absolute discretion decide are necessary or desirable in the interests of Unitholders and the Trust as a whole subject to and in accordance with the Rules"*, which is similar to the general power conferred on the Trustee in Clause 15.1.14. Specific provisions relating to the Manager's responsibilities to maintain the books and records of the Trust are set out in Clause 23 and relating to the distribution of income are in Clause 24.

19. Protection for the Manager is afforded by Clause 17.3:

> *"In the absence of fraud, negligence, wilful misconduct, bad faith, reckless disregard for or breach of its duties and obligations, the Manager shall not incur any liability by reason of any error of law or any matter or ting done or suffered or omitted to be done by it in good faith hereunder. The Manager shall not be under any liability except such liability as is expressly assumed by it under this Instrument."*

20. Clause 6 of the Trust Instrument empowered the Manager to suspend the calculation of the NAV and Unit Values and hence to suspend the issue and redemption of Units:

> *"whenever, as a result of events, conditions or circumstances beyond the control or responsibility of the Manager, disposal of the Trust Property or other transactions in the ordinary course of the Trust's business involving the sale, transfer, delivery or withdrawal of Investments is not reasonably practicable without being detrimental to the Trust or the interests of Unitholders as a whole."*

21. In exercise of that power, the Manager suspended dealings in the units on 24 December 2007. Clause 6.2 stated that *"the Manager will take all reasonable steps to bring any period of suspension to an end as soon as possible".*

22. I have set out above the reciprocal undertakings by the Trustee and Manager contained in Clause 2.8. Clause 35 contains mutual covenants by the Unitholders who, as I have said, were not parties to the Trust Instrument but covenanted to be bound by its terms when submitting an application for Units in the Fund:

> *"35 The Unitholders mutually covenant that each of them shall at all times act in good faith towards the others and the Trustee and shall observe, and shall use all reasonable endeavours to ensure the observance by others of, the terms of this Instrument."*

23. I note that there are no express covenants between the Manager and Unitholders.

24. The Plaintiff has pleaded the duties owed, for example as to the redemption of Units, by reference to the relevant provisions of the Scheme Particulars, not the Trust instrument. The Scheme Particulars declare, on page 7 thereof, under the heading "Key Features" that *"The following is a summary of the principal features of the Trust …."* I have not been told of any material error in the document produced by the Manager entitled 'Scheme Particulars' and I believe them to summarise accurately those parts of the Trust Instrument that purport to be summarised and for that reason I do not need to review it further.

The Allegations Concerning the Management of the Fund in 2007

25. The Plaintiff pleaded that the Defendant failed to comply with the notice periods regarding redemptions in the Scheme Particulars and did not impose an additional charge on redemptions in an attempt to deter investors from redeeming and thereby preferred some investors over others with the result that the consequent level of redemptions created liquidity problems that ultimately led to the otherwise avoidable decision to suspend dealings in the Fund. In doing so, the Defendant breached the duties it owed to investors generally, and the Plaintiff in particular. The Cause pleaded particulars of redemptions relating to a total of six investors, based on information supplied by the Defendant during disclosure in the substantive proceedings.

26. In its Defences, the Defendant denies acting other than in accordance with the rules governing redemptions, denies acting to the prejudice of other Unitholders and denies that the timing of the redemptions that were processed caused any loss to the Plaintiff whose redemption request received in January 2008 could not have been processed until April 2008, by which date all of CPF's Unitholding would have been redeemed in any event.

27. The largest of the six investors' holdings was an investment of £23million by The Charities Property Fund ("CPF"). It redeemed Units to the value of £6 million in April 2007 but the Manager should, it is claimed have delayed the redemption until August as it is alleged the formal written request was not received until early May. By comparing the Unit Values as at April with the Unit Values as at August, the Plaintiff pleaded that the early redemption cost CPF £107,066.38.

28. In oral submissions, Advocate Shepherd asked whether the Plaintiff was claiming that there was a gain to the Fund matching the loss to CPF. In doing so he highlighted the potential confusion in the presentation of the Plaintiff's case. Throughout the Cause there is reference to the value of redemptions, as if Unitholders were entitled to receive repayment of a sum owed to them as if the Fund operated as a bank account. Instead, the emphasis should be on the redemption of a number of Units. Each Unitholder was entitled to receive the value represented by the number of Units held. That value fluctuated from one month to the next and on redemption, the Unitholder's entitlement was to receive the value of its Units at the dealing date. The redemption of any number of Units by one or more Unitholders on that day did not affect the value of the Units held by other Unitholders as each of the Units that remained in issue was worth the same amount. Thus any suggestion that by redeeming some Units either earlier or later caused either a loss or a gain to the continuing Unitholders is fundamentally flawed.

29. Returning to the Cause, the allegations in respect of the CPF are that Units to the value of £6million were redeemed in April 2007 and should have been redeemed in August. In July, 2007, the Manager received informal notice of the redemption of £16.8 million of its Units which, it is alleged, should have been treated as a 'special redemption' request for processing

in January 2008 but instead was agreed to be processed in three instalments in September, October and November. In the event, liquidity problems prevented the November redemption from being paid and it was held over until the January dealing day. The allegation is that the preferential treatment given to CPF prejudiced other Unitholders.

30. The second investor whose redemption requests were set out in the pleadings was Walpole St Andrew Nominees Limited and James Brearley & Sons Limited who is claimed to be its independent financial advisor. In fact, Walpole was a nominee and the investments held in its name represented those of a number of Unitholders, each of whom was required under the terms of the Trust Instrument (and the Scheme Particulars) to be treated individually whereas the Plaintiff has incorrectly aggregated all their investments and treated Walpole and James Brearley as if they were a single large investor.

31. Standard life International Limited redeemed Units to the value of £1.5 million in four tranches between August and November allegedly as a result of being entitled to preferential terms. It is alleged that the redemptions should have been delayed until November, December, February and March. In its Defences, the Defendant admits that Standard Life was contractually entitled to preferential terms but avers that those preferential terms were not applied and instead its redemption requests were treated on the same terms as other investors.

32. Clerical Medical/CMI Insurance Company Limited submitted two requests for the redemption of Units totalling £165,000 in value which were processed in October but, it is alleged, should have been deferred until November. The Defences claim that the request was handled in that way due to an error on the part of the sub-administrator of the Fund who gave incorrect information to the Fund. The Plaintiff pleaded that CMI received a benefit of £4,888.88 due to the difference in Unit Values on the two dealing days. For my part, I do not see how that caused any loss to the Plaintiff as it only received the value attributable to its Units and even if they had been redeemed one month later, would not have caused any loss to the Plaintiff.

33. Kredietbank SA Luxembourgeoise was allowed to redeem Units to the value of £153,944.00 having submitted a request on 28 November for dealing on 30 November. Similarly, Citco Global Custody NV submitted a request one day later and received a redemption payment of £242,440.00.

34. Three other different allegations are pleaded. First, that the Plaintiff requested the Trustee to investigate the redemptions during the three month period prior to the suspension of the Fund and that the Defendant frustrated the investigation by failing to provide the Trustee with accurate information. Second that the Plaintiff has learnt from the Defendant's disclosure that a number of itemised payments were made from the Defendant's operating account after dealings were suspended. The Defences aver that none of those payments relate to a trade or redemption that took place after the suspension of dealings (paragraph 19O of the Amended Defences), a fact which is confirmed by Mr Bulpitt at paragraphs 64 to 66 of his Second Affidavit. Thirdly, the Plaintiff pleads that other Unitholders have made allegations against the Defendant.

35. In paragraph 85 of the Cause, it is pleaded that the Fund *"had suffered losses of £42.1 million during the period 31 December 2007 to 30 November 2010".* In reply, the Defences plead that such reduction in the value of the Fund was a product of market conditions that caused a decrease in the value of the Fund's underlying investments and thus falls outside the scope of any duty owed by the Defendant.

36. Paragraph 87 pleaded Particulars of alleged breaches of duty after the preamble that:

> *"87. By the actions set out above, the Defendant breached its duties and caused the Plaintiff loss. The actions of the Defendant were not ones that a reasonable and prudent investment manager of a unit trust acting in the best interests of all Unitholders could have undertaken in the circumstances."*

37. As I have said, the loss claimed is £2,071,824.76 based on the difference between the value of the Units held by the Plaintiff as at April 2007 when it says the first breach of duty of which it is aware occurred and the monies eventually received by it plus a loss suffered as a result of adverse exchange rate movements between the Euro and Sterling.

The Application for Summary Judgment and Strike Out

38. The Application for summary judgment is brought under Rule 19 of the 2007 Rules. The legal principles governing the Royal Court's approach to the interpretation of the Rule in this jurisdiction have been fully and carefully considered in a number of recent decisions including that of the Guernsey Court of Appeal in Musa Holdings Ltd v Newmarket Holdings (Guernsey) Ltd [2014] GLR 41and those of the Deputy Bailiff in EFG Private Bank (Channel Islands) Ltd v B. C. Capital Group S. A. (in liquidation) and 17 others [2014] GLR Note 11 and in Invescap Holdings Ltd v Douglass (unreported, 30 July 2014).

39. In short, we are guided by the decisions of the English courts in their application of the Civil Procedure Rules. As the Court of Appeal held in Musa (paragraph 18 at page 55):

> *"The overriding objective of the Rules that the court should deal with cases justly required it to recognize that, in the interests of the parties and of the general administration of justice, cases should not be permitted to proceed to trial (with the associated expenditure of costs and time) if the outcome were inevitable".*

40. Hence, Rule 19(2) which provides that:

> "*The grounds of the application for summary judgment shall be that-*
>
> *(a) the plaintiff has no real prospect of succeeding on the claim or issue, or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or issue,*
>
> *and there is no other compelling reason why the claim or issue should be disposed of at a trial.*"

is interpreted to mean that a claim shall not succeed if it has only a *"fanciful"* as opposed to a *"realistic"* prospect of success.

41. In support of the Application, Advocate Shepherd submitted that the following principles are relevant:

> *"(a) Has the Plaintiff satisfied the evidential burden of proving it has some real prospect of succeeding on its claim?*
>
> *(b) Does the Court have before it all the evidence necessary for the proper determination of the question or is there a need for a fuller investigation into the facts of the case?*
>
> *(c) Has the Plaintiff established there is some other compelling reason why the claim or issue should be disposed of at trial?"*

42. In reply, Advocate Williams submitted that the power to grant summary judgment is draconian in its nature and hence that such an application must be treated extremely seriously. It is well established by the authorities that such applications are for the swift disposal of cases and are not to be treated as an opportunity to conduct a mini-trial. He cited the judgment of Mummery L J in Bolton Pharmaceutical Co 100 Ltd v Doncaster Pharmaceutical Group Ltd and Others [2006] All ER (D) 389 (May) at paragraph 18:

> *"In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add or alter the evidence available to a trial judge and so affect the outcome of the case."*

43. He further submitted that the Defendant had a high evidential burden to overcome and had failed to do so, largely because the evidence adduced was opinion evidence given by a

witness of fact (Mr Bulpitt) who was not an independent witness and in circumstances where the Defendant had not applied to adduce expert evidence pursuant to Rule 10(1) of The Evidence in Civil Proceedings (Guernsey and Alderney) Rules 2011. He also described Mr Bulpitt's analysis as amounting to *"little more than bare assertions about the Plaintiff's case and the presentation of hypothetical and speculative figures produced to the Court without relevant supporting documents that would evidence the financial position of the Fund at the relevant times and the purported effect of the Defendant's calculations."*

44. A further line of argument advanced by Advocate Williams was that the case raised novel and complex questions of law concerning unit trusts in Guernsey and the network of legal duties between the parties in relation to which there had been no decided cases in the Guernsey courts.

45. I do not need to repeat in any detail the careful analysis of the principles governing applications for summary judgment and strike-out that have analysed and expressed in such detail by the Deputy Bailiff in judgments such as Invescap and in which he has extracted the relevant principles from the decisions of the English courts. In relation to the summary judgment application, I quote from paragraphs 34 and 35 of his judgment in Invescap:

> *"34. I have set out the approach I consider should be followed in a number of recent cases and Advocate Jones referred to the judgment from earlier this month in EFG Private Bank (Channel Islands) Limited v BC Capital Group SA (in liquidation) and others (unreported, 14 July 2014). Accordingly, as I have done before (see para. 33 of that judgment), I repeat the summary of the principles to apply given by Lewison J (as he then was) in Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch) (at para. 15), which I find sets out the considerations in an understandable fashion:*
> "*The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
> *vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of*

> *the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that it is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.*"

35. *The passage from para. 24.2.5 of the commentary in The White Book quoted at para. 36 of that previous judgment also deserves to be repeated in the context of this Application:*

> "*If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for trial. The standard of proof required of the respondent is not high. It suffices merely to rebut the applicant's statement of belief. The language of r. 24.2 ("no real prospect … no other reason …") indicates that, in determining the question, the court must apply a negative test. The respondent's case must carry some degree of conviction: the court is not required to accept without question any assertion they make: Britannia Building Society v Prangley June 12, 2000, unrep., Ch D …*"

46. The present strike-out application was brought under Rule 52(2) of the 2007 Rules, which provides that:

> "*The Court may strike out a pleading if it appears to the Court-*
> *(a) that the pleading discloses no reasonable grounds for bringing or defending an action,*
>
> *(b) that the pleading is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings, or,*
>
> (b) *that there has been a failure to comply with a rule, practice direction or Court order.*"

47. The Rule is similar to rule 3.4 of the Civil Procedure Rules and the Guernsey Court is again guided by the approach of the English courts. In Invescap, when interpreting Rule 52(2), the Deputy Bailiff had regard to the commentary in paragraph 3.4.2 of the White Book and I gratefully adopt his analysis without reciting it in full. The principles I extract as being relevant to the present Application are:

> a) Claims which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (Harris v Bolt Burdon [2000] L.T.L., February 2, 2000, CA).
> b) The principal test is whether the party's case is "bound to fail", which creates a high threshold before a pleading, or a part thereof, will be struck out. Simply because a case might be weak is not sufficient to justify striking out.

c) A statement of case is not suitable for striking out if it raises a serious issue of fact which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine-Brown January 19, 2000, unrep, CA).

d) Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (In Soo-Kim v Youg [2011]EWHC 1781 (QB)).

e) The court may strike out, as an abuse of the court's process, particulars of claim which are so badly drafted that they fail to reveal to the defendant, or to the court, the case the defendant can expect to meet at trial. However, proof of bad drafting is not, by itself, sufficient. The court should not strike out the particulars without first giving the claimant an opportunity to amend (see In Soo-Kim v Youg [2011] EWHC 1781 (QB)).

f) The purpose of the particulars of claim were explained by Moore-Bick LJ in Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co [2014] CP Rep 4:

"Particulars of claim are intended to define the claim being made. They are a formal document prepared for the purposes of legal proceedings and can be expected to identify with care and precision the case the claimant is putting forward. They must set out the essential allegations of fact on which the claimant relies and which he will seek to prove at trial, but they should also state the nature of the case that is to be made in order to inform the defendant and the court of the basis on which it is said the facts give rise to a right to the remedy being claimed."

g) It is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (Farah v British Airways, The Times, January 26, 2000,CA referring to Barrett v Enfield BC [1989] 3 W.L.R. 83, HL).

48. The grounds relied upon by the Plaintiff in seeking to strike-out the whole of the claim cover all three of the grounds set out in Rule 52(2) namely: (a) that it discloses no reasonable grounds for bringing an action against the Defendant; and/or (b) that it is an abuse of the court's process; and/or (c) that there has been a failure to comply with a rule, namely Rule 10(2)(a) of the 2007 Rules. The latter Rule states that:

> *"10 (2) The cause shall contain*
> *(a) a statement of the material facts on which the plaintiff relies for his claim, but not the evidence by which those facts are to be proved"*

49. The grounds for seeking to strike out a part or parts only of the claim rather than the entire claim are the same as above with, in addition, the contention that parts of the pleading are otherwise likely to obstruct the just disposal of the claim.

50. On behalf of the Defendant, Advocate Shepherd urged that the principles applicable to the present case were, in summary:

1) that the proceedings should be struck out if it is an unwinnable claim where continuance of the proceedings is without any possible benefit to either party and would waste resources on both sides;
2) that the proceedings should be struck out if there is no possible claim in law or fact;
3) if there is a novel point of law it should survive as decisions as to developing areas of jurisprudence or novel points of law should be based on actual findings of fact;
4) if there is a serious issue of fact to be decided, the claim should be allowed to continue; and

5) if the pleadings are found to be defective, the court should consider whether the defect might be cured by amendment and, if so, the Plaintiff should be allowed to amend the claim unless it has indicated it will not do so.

51. Acting for the Plaintiff, Advocate Williams did not materially disagree with Advocate Shepherd's summary of the relevant legal principles.

52. Advocate Shepherd stressed that the Defendant must know the case it has to answer. It is not sufficient for the Plaintiff to say merely that something has gone wrong. The Plaintiff must show what the Defendant should have done and what then would have happened. He criticised the Plaintiff's approach in the present case as being one of waiting to see what may turn up, as if it were pursuing the strategy of Mr Micawber. There had already been substantial disclosure and the Plaintiff had already substantially amended its cause and had indicated it had no intention of further amending it and therefore should not be given the opportunity to do so even it might otherwise be appropriate that the Plaintiff be invited to amend its pleadings.

53. The circumstances of the case are such that there is a considerable degree of overlap between the Applications for summary judgment and for strike-out. The Defendant contended that the Plaintiff cannot establish causation; that there was no duty owed by the Defendant to the Plaintiff; that the Defendant's duties were limited to those set out in the Trust Instrument and not in the Scheme Particulars; that at all times the Defendant acted within the powers conferred on it; and to the extent that the Defendant may have acted outside those duties, its conduct was ratified by the Trustee, which alone would have had the standing to bring any claim against the Defendant. The submission was that if any one of those points were to succeed, the claim would fall.

Causation

54. The legal test for causation is the "but for" test explained at paragraph 2-09 in Clerk & Lindsell on Torts, 20th edition: *"The "but for" test asks: would the damage of which the claimant complains have occurred "but for" the negligence (or other wrongdoing) of the defendant?"* The Plaintiff's claim is also brought on the basis of a breach of fiduciary duty, in relation to which, Snell's Equity (32nd edition), at paragraph 7-051 states: *"..the claim for breach of fiduciary duty takes on the characteristics of a duty-based claim…. Necessarily in such claims, the claimant's position is relevant, in the sense that a claimant cannot recover for loss which he would have suffered in any event. To be recoverable, it must be shown that the loss was caused by the breach of fiduciary duty. Thus, it becomes important to determine how the claimant would have acted but for the breach of fiduciary duty…"*.

55. Advocate Shepherd submitted that the Plaintiff had failed to plead anything that would establish on the balance of probabilities that the Fund could have survived for a sufficient length of time to enable the Plaintiff to have avoided his alleged loss, that is to say that the Plaintiff had not pleaded any allegations that would show that the Fund could have survived until April 2008; the Defendant had adduced evidence in Affidavits by Mr Bulpitt evidencing that the losses suffered by the Plaintiff would have occurred in any event.

56. Mr Shepherd cited the judgment of Coulson J in Pantelli Associates Ltd v Corporate City Developments Number Two Ltd [2010] EWHC 3189 as authority for the contention that, in the present case, the Plaintiff should have obtained expert evidence prior to issuing the claim and that its failure to do so was fatal. In Pantelli, the defendant's counterclaim was struck out for failure to comply with a previous "unless" order requiring the provision of proper particulars of allegations of professional negligence on the part of the claimant. Coulson J added that there was a second reason why the counterclaim should be struck out namely the failure to obtain expert evidence in support thereof. At paragraph 16 he said:

> *"Not only is it simply not good enough to turn a positive contractual allegation into an allegation of professional negligence by adding the words "failing to" to the obligation, but it is wholly inappropriate to do so in circumstances where there is no*

> *expert input to allow [the counter-claimant]to make such an allegation in the first place."*

57. The decision was summarised in the headnote:

> *"The amended pleadings were additionally inadequate in that they were unaccompanied by any supporting expert report or evidence. Subject to certain exceptions, such as allegations of negligence by solicitors where courts and legal advisers could be expected to understand the standards involved, it was now a requirement that any allegation of professional negligence be supported by a statement of expert opinion, since otherwise the professional concerned would be unaware of the case that had to be met."*

58. Advocate Williams summarised the Plaintiff's case on causation in the following terms. The Defendant acted in breach of fiduciary duty and/or in breach of the duty of care owed to Unitholders when it preferred the interests of certain Unitholders over the Untholders as a whole and by failing to take steps it could have taken in the interests of Unitholders as a whole which would have prevented the suspension of the Fund thereby causing loss to the Plaintiff.

59. The claim that certain Unitholders received favourable treatment is based on allegations that:

    (a) Applications for redemption were not properly processed in that some were redeemed earlier than required under the terms of the Trust Instrument or Scheme Particulars;
    (b) An application for redemption by a Unitholder (CPF) where the value of the Units to be redeemed was greater than 10% of the NAV was not treated as a Special Redemption;
    (c) The Manager failed to impose a 5% limit on redemptions on certain dealing days;
    (d) The Manager failed to take proper action to impose a redemption charge on a Unitholder where a redemption request would adversely affect the performance of the Trust.

60. I consider hereunder the Manager's duties and powers concerning redemption requests. For the purpose of looking at whether the Plaintiff has established causation, I will assume that it has redeemed Units earlier than it should have done and that it could have imposed restrictions and additional redemption charges as alleged by the Plaintiff. In doing so I will ignore the hypothetical analysis at paragraphs 43 to 56 of Mr Bulpitt's Affidavit in which he makes assumptions which he candidly admits *"necessarily involve an element of speculation, that they may be subject to legitimate differences of opinion".* The giving of opinion evidence is the territory of expert witnesses and Mr Bulpitt, being a director of the Defendant, is not an independent expert.

61. As I have said, each Unitholder was entitled to receive only the proportion of the value of the Fund that his Unitholding represented. The redemption of a number of Units and the payment to the Unitholder of their value at the date of redemption did not cause any loss to the remaining Unitholders. A Unitholder who, on redemption of a number of Units received a greater payment by being paid earlier than he would have received if he had had to wait until a later date by which time the Unit Value would have fallen as a result of a fall in value of the underlying investments caused by market conditions, could be said to have benefited from the early payment. It is not correct to argue that the Unitholders who continued to hold their Units suffered a corresponding loss; their Units would have continued to hold the same Unit Value.

62. The Plaintiff correctly acknowledges that the decision to suspend dealings in the Fund was caused by a liquidity problem. The Quarterly Investment Reports prepared by the Manager and exhibited to Mr Bulpitt's second Affidavit show that until the downturn in the commercial property market, the money received from subscriptions greatly exceeding redemptions. For example, Report No.9 dated 23 October 2006 shows that for the three

months ending October 2006 the Manager received subscriptions totalling more than £16 million whilst redemption requests amounted to a little over £51,000 in August and September and it was expecting £5 million of Units to be redeemed by CPF in November. Report No.10 issued on 5 February reported subscriptions of £6.7 million plus €1 million and redemptions of £737,788 and €2,500 in the three months from November to January. Report No.11 issued on 16 April 2007 showed a similar picture; subscriptions for three months, January to March, of £6.3 million and €1.4 million against redemptions of less than half a million pounds and €28,000. The Report advised that cash had been held back to meet the anticipated request to redeem £5 million of CPF's Unitholding. Report no 12, on 9 July 2007, reported that CPF had redeemed £6 million of Units, funded from cash, and that the total redemptions for the period April to June (including CPF) were £8.2 million and €62,000 whilst subscriptions in the same period amounted to approximately £5 million and €430,000.

63. Report No 13 issued on 22 October 2007 records that the situation had changed: *"The last quarter witnessed a turning point in the fortunes of the UK commercial property market and the expected deceleration of capital growth from yield compression was exacerbated by the 'credit crunch' that hit global investment markets in early August."* For the three months July to September, subscriptions were about £6.2 million and redemptions were a little less than £16 million or about £8.3 million excluding CPF whilst further redemptions to the value of £4.5 million had been held over.

64. The Report stated that there was an outstanding investment commitment to another fund ("Frogmore") of £3.5 million and warned about the potential cashflow shortage which was to be discussed, it said, at a board meeting on 29 October. The Report warned that *"Assets are also being considered for disposal".* The minutes of the board meeting are exhibited at pages 313 to 317 of Mr Bulpitt's second Affidavit. They record that *"historically the Fund had been able to meet redemption requests out of cash, but that redemptions placed for 31 October dealing and future redemptions may need to be funded by the Fund's overdraft facility and/or realisation of assets."* The board was advised that *"total net redemption requests for 31 October dealing amounted to £15.4 million. In addition, approximately £5million was outstanding in respect of [CPF's] redemption request".* A further £3.5 million was outstanding to Frogmore and the Fund's current cash holding was £6.6 million. The meeting went on to consider a paper from the investment advisor concerning the bid-offer spread and unit pricing which I do not need to refer to in detail.

65. The change in property market was also commented on in the Manager's report contained in the short form Interim Report and Financial Statements for the period 1 February 2007 to 31 July 2007:

> *"Outlook. Since the end of the period, the global credit crunch has hit financial markets and all asset classes are undergoing a pricing adjustment as risk is re-appraised and debt has become more expensive. As a result, investor demand for UK commercial property has reduced significantly and yields are being re-rated upwards."*

66. The number of Units issued in the Fund is shown in the Interim Report and Financial Statements for 31 July 2007 and the Annual Report and Financial Statements for the year to 31 January 2008, covering the period leading to the suspension of the Fund on 24 December 2007. On 31 July 2006, across all four unit classes, there were 58,500,000 units in issue. Six months later on 31 January 2007 the number had increased to 86,000,000 with a further slight increase to nearly 88,500,000 by 31 July 2007. Six months later on 31 January 2008 the total number of Units in issue had declined to 70,000,000.

67. In summary, the liquidity problem faced by the Fund was not caused solely by the level of redemption requests but by the significant decline in the value of subscriptions for new Units; redemptions could no longer be paid from subscription monies. The evidence shows that a significant cause of the lack of liquidity was the lack of sufficient subscriptions. In its Quarterly Investment Report in October, the Manager had raised concerns about the change in

fortunes of the UK commercial property market and the credit crunch. It is reasonable to assume that the same concerns led to the decline in subscriptions and to the decisions of some Unitholders to redeem all or part of their Unitholdings.

68. In order to resist successfully the Application for summary judgment, the Plaintiff must show that it has a realistic rather than a fanciful prospect of proving that, but for the decisions taken by the Defendant in respect of redemptions, the Fund would not have suffered the liquidity problems that led to the suspension of dealings. Or, in relation to the claim for breaches of duty, that the Plaintiff has a realistic prospect of establishing that it would not have suffered the loss claimed if the Defendant had not acted in breach of the fiduciary duties, as alleged.

69. The Plaintiff alleges that the suspension of dealings was avoidable. It must therefore show it has a realistic prospect of establishing not only that the decision to suspend dealings in December would have been avoided but that the Fund would have been able to continue to trade until the Plaintiff's Units could have been redeemed that is to say, until April 2008 in respect of those Units for which notice was given in January and until such later date as would have applied to any request to redeem the balance of the Plaintiff's Unitholding (which date is not pleaded in the Cause).

70. On the Plaintiff's own case, the redemption requests submitted by the six investors particularised in the Cause would have been processed on or before April 2008. If dealings had not been suspended, it is reasonable to assume, on the evidence adduced by Mr Bulpitt and recorded in the contemporaneous documents, that further applications for redemption would have been received. The evidence also suggests that the drop in the level of subscriptions that occurred after the credit crunch would have continued. Thus redemption requests would have had to be met largely through the realisation of investments which, as is shown in the minutes attached to Mr Bulpitt's second Affidavit and in the exhibited documents, would have been achievable only at prices lower than the published values for those investments and would have been subject to delays. There is no evidence to the contrary.

71. Any allegation that the Defendant was wrong to pay redemption requests out of its cash balances instead of investing the cash does not lead to the conclusion that the Plaintiff suffered loss. It was easier, more efficient and cost effective to service redemptions form cash than by realising investments.

72. I have concluded that the Plaintiff had no realistic prospect of showing that but for the actions of the Defendant the suspension of dealings could have been avoided until such time as the Plaintiff's Unitholdings had been redeemed. In respect of the claim for breach of fiduciary duties as pleaded, I judge that the Plaintiff has no realistic prospect of showing that it would not have suffered its alleged loss in an event.

73. I have considered whether the defects in the Cause could be remedied by amendment but I am satisfied they could not. I have formed that view without having regard to the fact that the Plaintiff has already amended the pleadings and has said it does not want to amend again but I have taken account of the fact that it has received substantial disclosure from the Defendant.

74. I have noted that the Plaintiff's allegations of failure to act in accordance with the rules governing redemptions from the Fund have been pleaded by reference to the Scheme Particulars and not the Trust Instrument. In my judgment, that is wrong. It is the Trust Instrument which is the governing document, the Scheme Particulars merely summarise some of the provisions of the Trust Instrument. If that were the only amendment, I would have allowed the Plaintiff to amend as it would be largely a technical and not substantive amendment.

75. In conclusion, I am persuaded that the Plaintiff has no realistic prospect of proving causation i.e. that the loss claimed was caused by the actions of the Plaintiff as pleaded in the Cause and, there being no other compelling reason why the claim should be disposed of at trial, it is

appropriate to order summary judgment in favour of the Defendant. For completeness, I add that I am also satisfied that there are grounds for striking out the claim under Rule 52(2) as there are no reasonable grounds for bringing the action and the claim is bound to fail. In case I am wrong, I will proceed to consider the other submissions of the Defendant.

Breach of Duty

76. The Defendant submits that the Plaintiff's claim is bound to fail and/or has no reasonable prospect of succeeding because

    (1) no duty as alleged or at all is owed by the Plaintiff to the Defendant;
    (2) the Defendant's duties are limited to those set out in, and the Defendant at all times acted within the powers conferred upon it by, the Trust Instrument; and/or
    (3) to the extent that the Defendant did breach any of those duties, its conduct has been approved or ratified by the Trustee, which alone would have standing to bring a claim against the Defendant in respect of the Fund.

77. It is a three pronged attack:

    (1) as a matter of law no relevant duties were owed by the Defendant to the Plaintiff;
    (2) as a matter of fact, the Defendant was not in breach of any duty; and
    (3) even if the Defendant breached one or more of its duties, a Unitholder has no standing to bring a claim against the Defendant in respect of such breach.

78. The alleged breaches of duty are pleaded at paragraphs 86 and 87 of the Cause

    "86. As a Fund Manager, the Defendant is subject to fiduciary duties to its clients and/or a duty of care. Ultimately, the duty is to act in the best interests of all the clients and with reasonable care and skill. The general duty is expressed in the Scheme Particulars under "Part 3: Unit Dealing" such that when acting in the interest of a Unitholder, the Fund Manager must do so in a way that does not materially prejudice the interests of the remaining Unitholders as a whole.

    87. By the actions set out above, the Defendant breached its duties and caused the Plaintiff loss. The actions of the Defendant were not ones that a reasonable and prudent investment manager of a unit trust acting in the best interests of all Unitholders could have undertaken in the circumstances."

PARTICULARS

    (a) The Defendant, when exercising its powers as Fund Manager, needed to have in mind the best interests of all the Unitholders;
    (b) The Defendant allowed and/or facilitated certain investors in the Fund to redeem their investments without giving the appropriate notice according to the rules as set out in the Scheme Particulars;
    (c) The Defendant afforded preferential terms to certain unitholders, for example Standard Life International Limited, which was not in the best interests of all the unitholders;
    (d) The defendant showed preferential treatment to certain investors, such as CPF, by alerting them to issued regarding the liquidity of the Fund and allowing/facilitating redemptions as set out above, and in breach of the Scheme Particulars;
    (e) To the extent that the Defendant was entitled to exercise discretion in relation to notice periods for any redemptions, it should have only done so where it was in the best interests of all Unitholders;
    (f) The Defendant did not exercise such discretion in the best interests of all the Unitholders – this is only exacerbated when it is considered that the financial position of the Fund was such in September/October 2007 that the preferential

redemptions to CPF may have only been achievable due to the existence of an overdraft facility;

(g) As a result of this, the Fund's reserves were substantially depleted between August and November 2007; and

(h) The Fund ultimately needed to be suspended and was suspended in December 2007."

79. In the second request of its Exceptions de Forme, the Defendant asked the Plaintiff to explain how the alleged fiduciary duties and duty of care arose and to whom they were owed. The reply was:

"The request includes matters of evidence. The Defendant is not entitled.

Without prejudice to the generality of the foregoing, pursuant to the Trust Instrument the Defendant was given legal authority to deal with and dispose of property which was not its own. In consequence, the Defendant owed fiduciary duties to unitholders including the Plaintiff, as particularised (below) in response to request 3.

The words 'its clients' refer to Unitholders, including the Plaintiff.

The Defendant is subject to a duty of care, which is owed to the Unitholders, including the Plaintiff, by virtue of:

i. the sufficiently proximate relationship between the Defendant as the Manager of the Fund and the Unitholders;

ii. the fact that the damage caused to the Plaintiff was reasonably foreseeable; and

iii. because it is fair, just and reasonable in all the circumstances to impose a duty of care upon the Defendant as the Manager of the Fund.

iv. the Defendant having assumed responsibility to Unitholders by accepting the position of Manager of the Fund pursuant to the terms of the Trust Instrument and the Scheme Particulars."

80. The Defendant's defence to those paragraphs is pleaded at paragraphs 20, 20A and 21 of the amended defences:

"20. Paragraph 86 of the Amended Cause is embarrassing and not properly pleaded. The Plaintiff has failed to identify the circumstances giving rise to an alleged fiduciary duty or the facts which the Plaintiff relies upon for imposing an alleged duty of care. The Plaintiff does not properly set out the scope or content of these alleged duties, or properly identify to whom those duties are owed. The Defendant reserves the right to plead fully to paragraph 86 once the Plaintiff has properly set out its case. Save as aforesaid, paragraph 86 of the Cause is denied.

20A. Without prejudice to the generality of the foregoing, it is denied that the Defendant owed the Plaintiff the alleged duties. Yet further, there is no basis for the imposition of the duties as pleaded in the Plaintiff's Responses to the Exceptions de Forme of 21 June 2013.

(a) Clause 19.1 of the Trust Deed provided that: "In no event shall a Unitholder have or acquire any rights against the Trustee or the Manager except as expressly provided for in this Instrument nor shall the Trustee or the Manager be bound to make any payment to any Unitholder or third party except out of funds held by or paid to it for that purpose under the provisions of this Instrument". Further, clause 2.6 of the Trust Deed provided that the terms and conditions of the Trust Deed were binding on each Unitholder (including the Plaintiff).

(b) By clauses 2.2 and 2.4 of the Trust Deed, the Trustee held (and holds) the whole of the Trust Property upon trust for the Unitholders, upon none of whom was conferred any interest or share in any particular part of the Trust Property.

(c) The Trustee was and is entitled and obliged, by clause 15.1.14 of the Trust Deed, to do all such other things as it may in its absolute discretion decide are necessary or desirable in the interests of Unitholders and the Trust as a whole.

(d) Such duties as the Defendant owed (which duties were expressly limited by clause 17.3 of the Trust Deed to the duties set out in the Trust Deed) were owed to the Trustee/the Trust and not to individual Unitholders such as the Plaintiff.

(e) Accordingly, the Plaintiff cannot (as it seeks to do in its Response 2 to the Defendant's Exceptions de Forme) assert that the Defendant's dealings with and disposal of property gives rise to a fiduciary duty owed to the Plaintiff, because the 'property' and any interest therein was held by the Trustee.

(f) Yet further, and accordingly, the Plaintiff cannot (as it seeks to do in its Response 2 to the Defendant's Exceptions de Forme) assert that it was owed a duty of care by reference to the three-stage test (or any other common law test), where any such duty of care was expressly excluded by clause 19.1 of the Trust Deed.

21. Paragraph 87 of the Amended Cause is denied. The Defendant did not breach its duties (the existence of which is denied pending receipt of further particulars to paragraph 86 of the Amended Cause), but acted at all times in accordance with the provisions of the Trust Deed, the Scheme Particulars and the 1990 Rules. The Defendant acted in a manner consistent with being a reasonable and prudent investment manager of a unit trust in the circumstances that were pertaining at that time. Furthermore:

21.1 Paragraph 87(a) is admitted. The Defendant at all material times paid full regard to the best interests of all the Unitholders;

21.2 Paragraph 87 (b) is embarrassing and not properly pleaded. The Plaintiff has failed to properly identify and/or particularise the 'certain' investors referred to in this paragraph. Without prejudice to the generality of the foregoing, the Defendant acted reasonably and consistently with the discretion, powers and obligations conferred upon it by the Trust Deed in relation to the processing of redemptions;

21.2A Paragraph 87(c) is embarrassing and not properly pleaded. Further and in any event, the Plaintiff has failed properly to identify and/or particularise the 'certain' investors referred to in this paragraph or to identify and/or particularise any corresponding duty or breach of that duty or causal consequence in relation thereto.

21.3 Paragraph 87(d) is denied for the reasons set out above;

21.4 Paragraph 87(e) is admitted. It is denied that the Defendant acted unreasonably in its exercise of discretion and/or that it consciously preferred the interests of any Unitholders over the interests of the plaintiff and/or that it consciously failed to act in the best interests of the Fund and/or Unitholders as a whole;

21.5 Paragraph 87(e) is denied for the reasons set out above. The redemptions to the CPF were achievable due to the cash position of

the Fund at that particular time, which was not in the best interests of the Unitholders as a whole to maintain and which was otherwise likely to lead to (or might reasonably have been considered to be likely to lead to) a breach of paragraph 3 of Part A of Schedule 1 to the Trust Deed and/or dilution of the Fund's performance, which would not have been (or might reasonably have been considered as not being) in the best interests of the Fund or its Unitholders (amongst whom was the Plaintiff). Two significant asset sales were in the pipeline and an overdraft facility was available to satisfy the Fund's short term funding requirements. Furthermore: (a) clause 7.1 of the Trust Deed authorised borrowing "for any purpose relevant to the Trust Objective or the implementation of the provisions of this Trust Instrument"; and (b) clause 17.1.24 of the Trust Deed authorised the Manger to "do all such other acts and things as the Manager may in its absolute discretion decide are necessary or desirable in the interests of Unitholders and the Trust as a whole";

21.6 Paragraph 87(g) is denied. Paragraph 21.5 is repeated;

21.7 Paragraph 87(h) is admitted insofar as it reflects the Defendant's decision to suspend the Fund, however it is denied that this amounts to a breach of the Defendant's duties to the Fund. The decision to suspend trading in the Fund was taken in the best interests of the Unitholders.

21.8 In all the circumstances each and every allegation of breach of duty is denied. It is further denied that the Defendant acted unreasonably.

21.9 Yet further, and without prejudice to the generality of the foregoing, the Defendant notes and relies upon the fact that the Plaintiff as omitted material allegations that would be required to establish breach of fiduciary duty, namely as to the Defendant's state of mind."

81. The Manager's duties and powers in respect of redemption requests are set out in the Trust Instrument and, as I have said, are summarised in part 3 of the Scheme Particulars. I will quote from the Trust Instrument:

"11.2 Unitholders may request redemption of their Units on any Dealing Day provided that a written request is received by the Manager;

11.2.1 where the value of the Units to be redeemed (calculated as at the Dealing Day immediately prior to the service of notice (the "Relevant Date")) is less than both amounts specified in clause 11.2.2, no later than five business days prior to the relevant Dealing Day (or such earlier or later day as the Manager shall from time to time determine); or

11.2.2 where the value of the Units to be redeemed (calculated as at the Relevant Date) is equal to or great than £500,000 or equal to or greater than 1% of Net Asset Value (as at the Relevant Date), no later than three months prior to the relevant Dealing Day (or such earlier or later day as the Manager shall from time to time determine).

11.3 Requests not received by the times set out in clause 11.2 will be held over until:

11.3.1 the next Dealing Day, where the value of the Units to be redeemed (calculated as at the Relevant Date) is less than either £500,000 or 1% of the Net Asset Value (as at the Relevant Date), whichever is less;

11.3.2 the first Dealing Day after a period of three months from the Business Day on which the Manager receives the written redemption request, where the value of the Units to be redeemed (calculated as at the Relevant Date) is equal to or greater than £500,000 or equal to or great than 1% of the Net Asset Value (as at the Relevant Date);

and Units will then be redeemed at the Unit Value applicable on that Dealing Day. Except in the case of a suspension of calculation of the Net Asset Value or Unit Value (when redemptions will be delayed) all redemption requests will, save at the discretion of the Manager, be irrevocable.

11.4 Where the value of the Units to be redeemed (calculated as at the Relevant Date) is greater than 10% of the Net Asset Value (as at the Relevant Date) a Unitholder may make a request that the following provisions shall apply to the redemption;

11.4.1 the Units shall be redeemed on the first Dealing Day after a period of 6 months from the date on which the Manager receives the redemption request, or such shorter period as may be agreed between the Unitholder and the Manager; and

11.4.2 the provisions of clause 11.9 shall not apply,

Except in the case of a suspension of calculation of the Net Asset Value or Unit Value (when redemptions will be delayed) all redemption requests will, save at the discretion of the Manager, be irrevocable.

11.9 The Manager may limit the value of redemptions (other than redemptions made pursuant to clause 11.4) on any Dealing Day to 5% of the Net Asset Value on that Dealing Day in circumstances where the Manager believes that such an action would be in the overall interests of Unitholders. Where this restriction applies, redemptions will be on a pro rata basis and any redemptions which for this reason do not occur in respect of any particular Dealing Day will be carried forward for realisation on the next Dealing Day as if the redemption request was in respect of that Dealing Day in priority to redemption requests subsequently received by the Manager."

82. Under clause 17.1.1 the Manager shall *"… process applications for the … redemption of Units … in accordance with Part 13 of the Collective Investment Schemes (Designated Persons) Rules 1988."* My attention has not been drawn to the 1988 Rules and therefore I assume they are not relevant for the purposes of these proceedings. I note in passing that is a mandatory, not discretionary, duty of the Manager. If the Defendant's case on the duties owed by the Manager is correct namely that no duty is owed to a Unitholder and/or any breach of such duty is not actionable by a Unitholder, it must follow that if the Manager failed or refused to process a redemption request, the only remedy for the Unitholder would be to bring an action against the Trustee, presumably, for breach of the reciprocal undertaking in Clause 2.8 of the Trust Instrument (cited above). It is unlikely that the Trustee could take action against the Manager under Clause 15.1.13, for failure to *"take reasonable care to ensure that the Trust is properly managed by the Manager in accordance with the Rules",* as the "Rules" referred to there are The Collective Investment Scheme Class B Rules 1990. For the reasons I give hereunder, I consider that it is at least arguable that a Court would hold that the Unitholder could bring an action against the Manager for such failure.

83. The Plaintiff's legal argument in support of its submission that it is at least arguable that the Defendant, as Manager of the Trust, owed fiduciary and/or common law and/or contractual duties to Unitholders such as the Plaintiff, relies principally on the decision of the Royal Court of Jersey (Herbert, Commissioner) in Barclays Wealth Trustees (Jersey) Limited (in its capacity as trustee of the R2 Bulgaria Property Fund) v Equity Trust (Jersey) Limited [2014] JRC 102 D. In that decision, which I consider below, Commissioner Herbert found that it is at least arguable that a trust and a contract may exist in a triangular relationship between the trustee, the manager and the unitholders and that the manager owed fiduciary duties to unitholders and/or could be held by a court to be a trustee of the trust. The Plaintiff submits that Commissioner Herbert's decision is the only judicial decision in which the nature of a unit trust and the duties owed by a manager have been considered by a court. No other decision has been drawn to my attention. Commissioner Herbert reviewed a number of articles published in academic literature: Underhill and Hayton Law of Trusts and Trustees (18th Edition); Kamfansin's the Legal Nature of the Unit Trust (Clarendon Press 1997 reprinted 2007); and Thomas and Hudson's the Law of Trust (2nd Edition).

84. For its part, the Defendant relies principally upon the wording of the Trust Instrument. That is to say it relies upon Clause 19.1 which limits any rights of a Unitholder to those expressly

provided for in the Trust Instrument and Clause 2.6 which provides that the terms and conditions of the Trust Instrument are binding on each Unitholder. It submits that such duties as the Defendant owed, as expressly limited by Clauses 17.3 and 19.1 of the Trust Instrument, were owed to the Trustee and/or to the Trust and not to any individual Unitholder such as the Plaintiff. He cited the decision of Harman, J in Galmerrow Securities Limited v National Westminster Bank (unreported, Chancery Division, 20 December 1993) in which he stated *"I am of the opinion that where property is paid to a person intended to be a trustee upon the terms that the property will be held pursuant to an instrument known to the payor to be the intended trust deed, then the fiduciary duties of the intended trustee are limited to the terms of the intended deed."* Further, he sought to distinguish the Jersey case of Barclays Wealth on the basis of differences in wording between the trust instrument with which that case was concerned and the Trust Instrument in the present matter. He also sought to rely upon the fact that in the present case the Trustee had reviewed and affirmed the Manager's actions whereas there was no indication that the same had happened in Barclays Wealth.

85. I gratefully accept and adopt the learned analysis of Commissioner Herbert in Barclays Wealth which is at the very least persuasive in this jurisdiction. I will decline the invitation that was extended to me by counsel to reach a definitive judicial decision on the legal issue. In doing so, I am mindful that it is not appropriate to strike out a claim in an area of developing jurisprudence since, in such areas, decisions as to novel points of law should be based on actual findings of fact.

86. I do not consider it necessary in this judgment to review the Barclays Wealth judgment in detail as I consider the legal position is at least arguable. Applying the analysis in the judgment to the documentation summarised by me above, I am persuaded that the following propositions are at least arguable. The relationship between the Plaintiff, the Defendant as Manager, and the Trustee is a tripartite arrangement or a triangular relationship, as Advocate Williams described on behalf of the Plaintiff. It is both contractual and triangular. The Application Form executed by the Plaintiff envisaged acceptance both by the Trustee and the Manager. (The documentation supplied to me does not include a copy of the Application Form signed by either the Trustee or Manager but provision was made in the document exhibited to the third affidavit of Mr Bulpitt for them both to do so and I assume that they did; counsel have not suggested otherwise.) The wording of the Application Form has all the features of a contract and in my judgment there is no doubt that upon acceptance of the Plaintiff's application, a contract was completed between the three parties.

87. The Trust Instrument is very different in its terms from those of a typical private trust. It has many features of a contractual document but there is no doubt that a Trust exists, as defined in section1 of The Trusts (Guernsey) Law, 2007. The powers and duties of the Trustee are more limited than are normally seen in a private trust because many of those duties and powers are entrusted to the Manager.

88. In the article by Mr Sin which Commissioner Herbert reviewed, a unit trust is described as being essentially contractual but with a trust relationship created by the contractual nexus and with the manager having fiduciary obligations that it owed to the unitholders.

89. Professor's Hudson's analysis was different but, as Commissioner Herbert pointed out, it was to some extent based upon the law of England and Wales and my therefore, in some respects, be different from the law of either Jersey or Guernsey. Nevertheless he concluded that the scheme manager (as he described the post of manager) *"falls to be considered to be a fiduciary because his investment obligations are owed entirely for the benefit of beneficiaries, to whom the scheme also owes direct contractual obligations."* He considered there to be both contractual and fiduciary obligations and stated *"it would seem more sensible to suggest that the scheme manager bears the investment obligations of the trustee and therefore should be liable as a trustee for any breach of those obligations."*

90. In the case of the Unit Trust with which I am concerned, if it were the case that the Manager owed no duties to a Unitholder enforceable by the Unitholder, a Unitholder who sought to

claim a remedy for a breach by the Manager of any of its obligations would have to take action against the Trustee for failing to take reasonable care to ensure that the Trust had been properly managed by the Manager in accordance with the Rules (Clause 15.1.13 or under Clause 2.8 for breach of their reciprocal undertakings or any other similar provision of the Trust Instrument).

91. If that were the only remedy available, it would have serious limitations as can be demonstrated by considering a hypothetical situation where a minority of Unitholders could clearly demonstrate that they had been prejudiced by actions of the Manager taken in the interests of the majority only. The minority would have to request the Trustee to investigate the Manager's actions. If the Trustee were satisfied that there were grounds for bringing a claim against the Manager but required funds to do so, the Manager would have to convene a meeting of Unitholders to approve an extraordinary resolution to authorise expenditure by the Trustee to enable it to pursue the action. It is easy to see how the interests of such minority Unitholders would be frustrated and overridden. In my view, it is at least arguable that in such circumstances the Court would find a remedy to enable a minority Unitholder to take appropriate action against the Manager.

92. In conclusion, like Commissioner Herbert, I agree that the legal position is at best arguable. However the full facts have not been established and, in such circumstances, it is inappropriate to be making a legal ruling on a novel point of law which could have significant implications for unit trusts, for those who invest in them and for those who manage them or act as trustees. If I had not decided to grant summary judgment and to strike out the claim on the ground that there is no realistic prospect of proving causation, I would not have done so on the basis that as a matter of law no duties were owed by the Manager to the Unitholders.

93. I turn next to consider whether as a matter of fact the Plaintiff would have had no realistic prospect of establishing breach of duty if duties were, as a matter of law, owed to it by the Defendant and if I had not awarded summary judgment to the Defendant. One of the submissions made by Advocate Shepherd on behalf of the Manager is that in the Cause the Plaintiff has treated all the respective redemption notice periods as if they were mandatory when in each instance there was an element of discretion. Under Clause 11.2, the Manager had the ability to agree to accept redemption notices received either earlier or later than the specified day. Clause 11.4 enabled the Manager to agree a period shorter than six months with the Unitholder where the value to be redeemed was greater than 10% of the NAV. The power to limit redemptions under Clause 11.9 was also discretionary.

94. In reply to the particulars pleaded in paragraph 87 (quoted above), the Defendant alleged the following (the sub-pragraphs refer to sub-paragraphs in paragraph 87):

    (a) It admits that it needed to have in mind the best interests of all the Unitholders and contends that it did so.
    (b) It contends that given the wording of the powers, the Defendant did act reasonably consistently with the discretionary powers and obligations conferred upon it.
    (c) It contends that there is no basis either in law or fact that it afforded preferential terms to certain investors such as Standard Life International Limited.
    (d) It contends that even if the allegation in paragraph 87 (d) were correct, it would not amount to a breach of the powers vested in the Defendant under the Scheme Particulars or the Trust Instrument.
    (e) It contends that it did in fact exercise its discretion in relation to notice periods for any redemptions in the best interests of the Fund and/or Unitholders as a whole.
    (f) The allegation is of no consequence. The overdraft was not used although it was available if it needed to be.
    (g) In addition to the points made above, the contention of the Defendant is that the difficulties for the Fund arrived at a later date as a result of the collapse of the property market.

(h) The Defendant agrees that the Fund needed to be suspended but denies that it was a breach of its duties under the Trust Deed and to suspend dealings in December as it was in the best interests of the Unitholders to do so.

95. In support of the present Application, a substantial amount of evidence has been adduced in the affidavits and exhibits thereto of Mr Bulpitt. The evidence includes contemporaneous correspondence, minutes and e-mails detailing the considerations of the Defendant. It is not the purpose of summary judgment and strike out applications to conduct a mini trial or to attempt to reach detailed factual conclusions especially where there may be disputed matters.

96. Accordingly, I have concentrated primarily on the case as pleaded by the Plaintiff in the Cause. As I said above, one of the criticisms of Advocate Shepherd on behalf of the Defendant is that the Plaintiff has pleaded the provisions relating to redemption notice periods as if they were mandatory and ignored the discretion and flexibility bestowed upon the Manager under the terms of the Trust Instrument. Where the value of the Units to be redeemed was less than £500,000 or less than 1% of the NAV, Clause 11.2.1 and 11.2.2 provided that a written request shall be received by the Manager *"no later than five business days prior to the relevant Dealing Day* ***(or such earlier or later day as the Manager shall from time to time determine)****"* (my emphasis), or if the value to be redeemed was greater than either of those amounts, the written request must be received *"no later than three months prior to the relevant Dealing Day* ***(or such earlier or later day as the Manager shall from time to time determine)****"* (my emphasis).

97. By virtue of Clause 11.4, where the value of the Units to be redeemed was greater than 10% of the NAV, the Unitholder "**may**" request that the Units be redeemed on the first Dealing Day to occur after six months has elapsed form submitting the request ***"or such shorter period as may be agreed between the Unitholder and the Manager"*** and except where dealings were suspended all redemption requests are irrevocable ***"save at the discretion of the Manager"*** (again, my emphasis). Furthermore, where the value of redemptions on any Dealing Day exceeded 5% of the NAV: ***"****the Manager* ***may*** *limit the value of redemptions"* (my emphasis, again) (Clause 11.9).

98. Thus it can be seen that the Trust Instrument confers on the Manager considerable discretion and latitude as to the handling of redemption requests. That discretion and latitude is not acknowledged by the Plaintiff in its Cause where the respective periods of five business days, three months and six months are all quoted as if they were mandatory, inflexible, time periods that had to elapse before a redemption request could be processed.

99. The particularised breach of duty at paragraph 87 (b) of the Cause that *"the Defendant allowed and/or facilitated certain investors in the Fund to redeem their investments without giving the appropriate notice according to the rules as set out in the Scheme Particulars"* is based on the false assumption that the notice periods are fixed and the allegation is therefore misconceived.

100. The allegations concerning the processing of redemption requests in the period leading up to the decision to suspend dealings in the Fund are fundamental to the Plaintiff's claim. The evidence adduced by the Defendant in support of the present Application, largely in the Affidavits sworn by Mr Bulpitt and the exhibits thereto, demonstrates that the Defendant was aware of its powers and purported to act within the scope of the terms of the Trust Instrument. In order to succeed with its claim, the Plaintiff would have to prove not that the Defendant failed to observe the fixed time periods cited above but that in deciding whether or not to abbreviate or lengthen those periods it was acting in breach of its powers. That is not how the Plaintiff has pleaded its case but even if it had done so, it would have required expert evidence to rebut Mr Bulpitt's factual evidence and it has not produced any expert evidence.

101. The decisions as to whether to impose an additional charge on redemptions and to limit the level of redemptions on any given Dealing Day were also matters of discretion, as to which the Plaintiff has again not adduced any expert evidence to rebut the factual (as opposed to

opinion) evidence adduced by Mr Bulpitt. The pleadings would have to set out what the Plaintiff alleges the Defendant should have done, when it should have taken such action and what the consequences would have been; the Cause does not do so.

102. If the Plaintiff's failure to plead its case in that way were the only ground for granting summary judgment or striking out the claim, I would have to consider whether to allow the Plaintiff leave to amend. I would probably refuse leave both on the basis that the Plaintiff has already had every opportunity to amend and has in fact amended its claim and also on the basis that the amendment would be a radical alteration to the case.

Trustee Investigation

103. At paragraphs 70 to 75 of the Cause, the Plaintiff pleaded details of its request to the Trustee to investigate the redemptions processed by the Defendant in the three months prior to the suspension of dealings. The allegations amount to a complaint that the Trustee did not carry out its investigation properly and it concludes by alleging that the Defendant did not supply the Trustee with accurate information. In my view, the allegations could more properly have been pleaded against the Trustee, if the Trustee were a party. In any event the Manager's failure to co-operate with the Trustee's investigation, even if it were proven, was not the cause of the loss claimed by the Plaintiff. I would therefore order that paragraphs 70 to 75 be struck out if the remainder of the claim were able to continue.

Bank Reconciliations

104. At paragraphs 76 to 79, the Plaintiff set out details of a number of payments from the Fund totalling £3,380,549.60 in December 2007 and £914,394.74 in the following month and called for an explanation as to why they were processed. In the defences, at paragraph 19O, the Defendant pleaded that none of the allegations appear to relate to any pleaded breach of duty that is alleged to have caused loss to the Plaintiff and that none of the payments relate to any redemption or trade that took place after the November Dealing Day.

105. I would be minded to strike out the paragraphs unless the Plaintiff were able to amend its Cause to include only such payments as were alleged to have been made in breach of any duty owed to the Plaintiff and which caused loss to it.

Other Unitholders' Allegations against the Defendant

106. In paragraphs 80 to 84, the Plaintiff alleged that other Unitholders have made complaints against the Defendant and sought for confirmation of how many have done so, or issued proceedings against the Defendant, and disclosure of their identity. It is not a proper use of the Cause to seek such disclosure and I would order that those paragraphs be struck out, if the claim were continuing.

Losses to the Fund

107. In paragraph 85 it is said that the Fund had suffered losses of £42.1 million during the period 31 December 2007 to 30 November 2010. The Defences state (paragraph 19R) that any 'loss' was due to a decrease in the value of the Fund's investments and deny that the amount is relevant to the Plaintiff's claim. Rather than strike out the paragraph, I am of the view that the underlying performance of the investments is relevant to the loss in the value of the Plaintiff's Unitholding and is highly relevant to the issue of causation.

The Cause Contains Matters of Evidence

108. I agree with the Defendant that there is much evidence and unnecessary matter pleaded in the Cause. As a result, the pleadings, both the Cause and the Defences, are much longer than they need to be. The unnecessary content does not assist the Court in understanding the claim. If I was not ordering summary judgment, I would be making an order that the Cause be recast by omitting all the unnecessary content.

Conclusion

109. It is of course highly regrettable that the Plaintiff lost a substantial portion of the money it had invested in the IPPF. However, in seeking to hold the Manger responsible for the loss, it is ignoring the change in the global market that occurred in the summer of 2007 with the credit crunch and the downturn in the UK commercial property market. The Plaintiff's claim is based on the premise that the Defendant offered preferential treatment to a number of Unitholders to the prejudice of other Unitholders in the manner in which it processed redemption requests submitted by them and, in so doing, was in breach of the duty of care and fiduciary duties owed to Unitholders generally, thereby causing loss to the Plaintiff.

110. The Plaintiff alleges that the decision by the Manager to suspend dealings in the Fund taken on 24 December 2007 was avoidable. However, the evidence adduced by Mr Bulpitt in his Affidavits shows that prior to the credit crunch, subscriptions to the Fund greatly exceeded redemptions and thus redemptions could be paid from the available cash. Following the credit crunch, the level of subscriptions reduced dramatically whilst the level of redemptions increased, thereby causing the liquidity problem that prompted the decision to suspend dealings.

111. In the circumstances, the Plaintiff has not persuaded me that it has a reasonable prospect, a more than fanciful prospect, of showing that: a) in respect of any alleged duty of breach of care, but for the actions of the Defendant, the Plaintiff would not have suffered the loss; and b) in respect of breach of any fiduciary duty owed to the Plaintiff, the Plaintiff would not have suffered the loss if the Defendant had acted without breach of fiduciary duty. I therefore order that summary judgment be awarded in favour of the Defendant under Rule 19 of the 2007 Rules. Furthermore, I am persuaded that the Plaintiff's case is bound to fail and hence that it should be struck out under Rule 52(2) of the 2007 Rules.

112. It is, in my judgment, at least arguable that fiduciary duties and/or a duty of care may be owed by the Manager to the Plaintiff. Whether that is so involves a novel point of law as to the tripartite relationship that exists between the trustee, manger and unitholders of a unit trust on which, as yet, there is no conclusive judicial decision. Resolving such an important legal question is not a matter for applications of this matter and would require full consideration of the factual matrix of the relationships, after a full trial on the facts.

113. If fiduciary duties and/or a duty of care existed as matter of law, the Cause does not plead sufficient particulars of any breach of such duties and if the claim were allowed to proceed, I would probably have refused leave to amend.

114. Other parts of the pleadings would also be liable to be struck out on the ground that they do not go towards establishing the loss pleaded and/or are matters of evidence and/or are inappropriate.

Costs

115. In the Application, the Defendant has sought an order for costs on the full indemnity basis. I have not heard argument in relation to costs but my preliminary view is that as costs normally follow the event, the Defendant is entitled to an order for costs. Whether that be on the recoverable or full indemnity basis is arguable. However, given the grounds on which I have decided the Applications, there may be grounds for submitting that the Plaintiff brought the claim unreasonably and hence that indemnity costs would be the appropriate order.

116. I order that any application for costs is to be brought within 21 days, together with a short skeleton argument, and the other side shall have 21 days to submit any written response to the application and the skeleton argument.

Sir Richard Collas
Bailiff

Postscript. I sincerely apologise to the parties, and to their counsel, for the considerable length of time that it has taken to produce this decision which has been far longer than I would have wished or than the parties are entitled to expect. It has been occasioned largely by the complexity of the issues, by the volume of reading that has been required and my other commitments. In order to attempt to reduce the risk of delays in deciding future applications, may I suggest that it would be most helpful if counsel, when requesting hearing dates in lengthy or complex matters, could notify the Greffe of the length of the reading time that will be required by the judge before hearing the application in order to familiarise himself with the case, and the issues involved, as well as providing their best estimate of the length of the hearing. Such information will greatly assist the Greffe staff and the judiciary in ensuring that the matter is assigned to a judge who is best able to deal with it and to do so expeditiously.